

On August 2, the Environmental Protection Agency (EPA) closed the comment period for its Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Docket #EPA-HQ-OW-2021-0302-0001). EPA's notice of intent indicated that its revisions would be done "in a manner that is well informed by stakeholder input on the rule's substantive and procedural components; is better aligned with the cooperative federalism principles that have been central to the effective implementation of the Clean Water Act; and is responsive to the national objectives outlined in President Biden's Executive Order 13990." The EPA received nearly 3,000 comments.

The WSWC submitted a transcript of the listening session between its members and EPA, and the Western Governors' Association (WGA) submitted its "list of potential process improvements to ensure the efficient and effective administration of this vital state authority." Governor Mark Gordon (R-WY) noted that the single listening session with WGA on July 15 does not suffice for rule revisions where states are co-regulators. "To craft a revised rule that envisions thoughtful consideration for the principles of cooperative federalism, we need in-person, productive discussions in order to ensure that a revised rule would be well informed by stakeholder input."

Several states noted that the pre-filing meeting requests, while important and useful for large projects, may be unnecessarily burdensome for small projects with minimal impacts, or emergency projects that need expedited approval. Many states recommended adding a provision that enables the certifying authority to waive or reduce the 30-day pre-filing period as appropriate. Additionally, some states noted that the pre-filing meeting can be confusing or ineffective for applicants that haven't submitted any project information yet, and may be entirely unnecessary, e.g., where the activity is already covered by a nationwide permit.

Alaska, Nebraska, Oklahoma, South Dakota, and Wyoming supported the current limited scope of review to water quality concerns, while California, Colorado, Idaho, Nevada, Oregon, Utah, and Washington assert that the scope is too narrow to effectively protect the environment and public health. Alaska recommended that the 401 certification should focus more narrowly on the impacts of dredge and fill activities under CWA 404 permits, and suggested that "associated activities" should not be leveraged to regulate impacts beyond a state's enacted water quality standards. Nevada argued that the scope of review must include consideration of the project activity as a whole in order for the project to comply with federal and state water quality requirements.

Several states pointed out that the 2020 rule's list of information for a complete application is too narrow to evaluate water quality impacts, and that the list needs to be flexible to ensure that states can determine when an application is complete. California pointed out that the list "is missing key elements, such as any reference to compensatory mitigation plans, restoration plans for temporary impacts, analysis of long-term operational water quality impacts, drought contingency planning, an analysis of a 'no project' scenario for re-licensing of long-term projects, and in-water work plans...."

Some states supported the narrowed deadlines for certifications to less than one year, and many states agreed that for simple projects, the shorter timeframes were sufficient. However, many states noted that for larger, more complex projects, extensions are necessary to complete the certification process in a way that protects water quality. Some states argued that the limited timeframe was unlawful under the federal statute. Utah noted that the new rule interferes with its public outreach and notice practices and is inconsistent with Utah statutory requirements. South Dakota argued that Congress granted the one-year maximum reasonable period of time to states, not to federal agencies. Oklahoma believes the statutory one-year limitation is reasonable, and that states should not unreasonably withhold a determination on certification. Given the short review timeline, some state may deny certification.

Additionally, federal requirements throw a wrench in the ability of states to complete certifications in a timely manner. Alaska cited problems with federal agencies raising issues late in the process and expecting state agencies to conduct an antidegradation assessment at high levels of protection in the "11th hour." Idaho noted that for individual permits and licenses, federal baseline requirements are an important step in evaluating a project and issuing protective and defensible certifications. The 2020 rule "mistimes" the certification request and the federal process. Idaho added the rule should be amended "so that the certification process starts when the certifying authority verifies in writing that it has all information necessary to proceed with a certification decision." South Dakota recommended that certification requests either come from the federal agency or that the project proponent submit their application to the state after the

federal agency has deemed the application to be complete, which "...should reduce the amount of altered, cancelled, or stalled certification requests while the project proponent is working with the federal agency."

Many of our states objected to federal oversight of the certifications, both the authority to review state denials and certification conditions, as well as the authority to enforce state conditions. They noted that states are in the best position to understand local water quality impacts and the need to set and enforce conditions to protect water quality under state and federal law.

Several states pointed out the need for states to be able to modify permits and make use of "reopener" clauses. California said the regulations should clearly establish the state authority to reopen and modify certification provisions to ensure continued compliance with updated water quality standards for long-term permits and licenses. Colorado commented that the 'reasonable assurance' standard, or an alternative that makes room for adaptive management to address future unforeseeable impacts, should be reinstated. States emphasized the fact that project changes after certification should allow for the state to reopen and reconsider the updated plans and projected impacts.

Several states noted that the 30-day requirement to seek input from neighboring jurisdictions seems ineffective due to federal agency backlog, imposing an additional delay to projects without obtaining meaningful input. Idaho also encouraged EPA to coordinate its revisions of the 401 regulations with planned revisions to Waters of the United States. For a copy of the comment letters to EPA see: <https://westernstateswater.org/policy-letters/2021/clean-water-act-section-401-certification-rule/>.